Any imprisonment which the accused has suffered since that date will be deemed part of this sentence. Any balance of imprisonment not suffered will run from the date on which he is arrested or submits himself for arrest.

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QUEEN-EMPRESS v. NARAIN SINGH.

APPELLATE CIVIL.

1900
May 14.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

NAJM-UN-NISSA (PLAINTIFF) *v.* AJAIB ALI KHAN (DEFENDANT).*

Muhammadan law—Pre-emption—Invalid sale—Time when right of pre-emption arises.

No right of pre-emption arises upon a sale which, according to Muhammadan law, is invalid, as, for instance, by reason of uncertainty in the price or the time for delivery of the thing sold; but if such sale become complete, as by the purchaser getting possession of the thing sold, then the ownership of the purchaser becomes complete, and a right of pre-emption arises, but neither ownership nor the pre-emptive right relates back to the date of the contract of sale. *Begam* v. *Muhammad Yaqub* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof* and Pandit *Moti Lal* for the appellant.

Mr. *Karamat Husain* for the respondent.

HENDERSON J. (BURKITT, J., concurring)—These second appeals, No. 631 of 1897 and No. 687 of 1897, have been heard together.

The facts are very simple. One Amirullah, who was the owner of one of four adjacent houses, on the 17th May 1895, by a registered contract of sale, sold that house to Ajaib Ali, the respondent in this appeal, for Rs. 84 for the site, and a further sum for the buildings, to be ascertained by carpenters or masons to be appointed by the vendor and vendee, it being stipulated that upon the additional sum being ascertained and paid, possession of the house should be made over within ten days.

On the 14th July 1896, Abrar Husain, the owner of the remaining three houses, sold them to his wife, Najm-un-nissa, the

* Second Appeal, No. 631 of 1897, from a decree of D. F. Addis, Esq., C. S., District Judge of Shahjahanpur, dated the 2nd August 1897, reversing a decree of Babu Baij Nath, Subordinate Judge of Shahjahanpur, dated the 3rd June 1897.

(1) (1894) I. L. R. 16 All., 344.

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present appellant. It so happened that Amirullah did not carry out the terms of his contract with Ajaib Ali, refusing to join in appointing carpenters or masons to ascertain the price of the buildings, and the latter found it necessary to institute a suit for specific performance of the contract, and eventually obtained a decree on the 15th May 1896, whereby, *inter alia*, it was directed that the parties to the suit should within a month join in nominating four carpenters or masons to ascertain the value of the buildings, and that in default of their so doing, the Court Amin should ascertain the value. The parties did not carry out the first direction, and the Amin subsequently made an inquiry and ascertained the value to be Rs. 111-8-0. This sum Ajaib Ali paid on the 15th August 1896, and thereafter, on the 6th September 1896, he obtained possession under the decree. Neither the contract of the 17th May 1895 nor the decree in the suit for specific performance are upon the record, but the facts, as above stated, are admitted.

Najm-un-nissa and Ajaib Ali have now each sued the other, each claiming to have a right of pre-emption against the other. Both suits were filed on the 22nd February 1897. Najm-un-nissa in her suit alleged that the proprietary right or ownership in the house purchased by Ajaib did not pass to him on the execution of the contract of the 17th May 1895; and that on the date of her purchase, namely, on the 14th July 1896, he was not the owner, and in fact did not, according to Muhammadan law, become the owner until the 6th September 1896, when he got possession, and she claimed that her right of pre-emption against him then arose.

Ajaib Ali in his suit claimed to have been the owner of the house purchased by him as from the 17th May 1895, the date of the purchase by him, and, as such, to have been entitled to pre-emption as against Najm-un-nissa upon her purchasing her house on the 14th July 1896. In the other suit he contended that Najm-un-nissa could have no right of pre-emption against him, as her purchase was long after his.

The first Court decided in favour of Najm-un-nissa's contention and dismissed the suit of Ajaib Ali. On appeal the District Judge dismissed both suits.

Both have now appealed to this Court. The only questions argued before us were as to the effect, according to Muhammadan Law, of the contract of sale of the 17th May 1895. Mr. *Abdul Raoof*, who appeared for Najm-un-nissa, contended—(1) that the contract of sale to Ajaib Ali was what is known to the Muhammadan Law as an invalid sale; (2) that no right of pre-emption can be claimed by or against the purchaser under an invalid sale so long as the invalidating circumstances or conditions exist; (3) that the sale to Ajaib Ali did not become complete until he obtained possession on the 6th September 1896, and that until that date the proprietary interest of his vendor did not pass to him. He has referred us to the case of *Begam* v. *Muhammad Yakub* (1), a case decided by a Full Bench of this Court, and to a large number of authorities on Muhammadan Law. The case referred to is an authority for the proposition that in considering whether a right of pre-emption arises the Muhammadan Law is to be applied, and that if there is a complete sale under that law, although not under the general law, the right of pre-emption will arise. It is also an authority for the proposition that the sale to Ajaib Ali was complete on the 6th September 1896, when the price had been paid and possession given to him; but it is not an authority, unless perhaps impliedly, upon the question whether the ownership in the house purchased by Ajaib did or did not pass to him as from the date of his purchase.

In support of the contention that the contract of sale of the 17th May 1895 was an invalid sale, a number of passages from Baillie's Muhummadan Law of Sale and other text-books on Muhammadan Law have been referred to. In Baillie's Muhummadan Law of Sale at p. 4, dealing with the conditions necessary to the validity of sale, it is said: (it is required) "thirdly, that "both the thing sold and the price be so known and determined as "to prevent dispute between the parties, and any ignorance that "may tend to produce contention between them is sufficient to "invalidate the sale, as in the case of a single goat undefined from "a particular flock, or *of anything at a price to be fixed by "another person.* * * * Fifthly, it is necessary to the validity "of all sales that they be free from vitiating or invalidating

(1) (1894) I. L. R., 16 All., 344.

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"conditions which are of various kinds. * * They may be "described generally in this place as conditions that are not in "harmony with the contract or within the usual scope of such "transactions among men, or conditions that are dependent on "events that are either altogether fortuitous, or the time of the "occurrence of which cannot *be predicted with any degree of "certainty.*"

The original text from which the former portion of the passage quoted has been taken with its translation is as follows:—

و منها ان يكون المبيع معلوماً والثمن معلوما علما يمنع من المنازعة فبيع المجهول جهالة تفضي اليها غير صحيح كبيع شاة من هذا القطيع و بيع الشي بقسمة و بحكم فلان *

عالمگيري جلد ثالث كتاب البيوع باب اول صفحه ٣ - طبع نولكشور *

(Alamgírí, Vol. III, p. 3, Lucknow edition.)

"One of them (the conditions of the validity of sale) is that "the thing sold and the price be so known as to avoid any dis-"pute, hence the sale of a thing so unknown as to lead to dispute "is invalid; for example, the sale of any goat in a particular flock "*and the sale of a thing for its price (whatever it may be) or "(for such a price) as such an one may settle.*"

In Baillie's Moohummudan Law of Sale, at p. 176, it is said:—"Any ignorance of the thing sold or of the price that "affords room for objection to its delivery prevents the legality of "sale;" and again at p. 208:—"When delay is stipulated for "in the delivery of the thing sold and the thing is specific the "contract is invalid." In Hamilton's Hedaya, edition 1870, at p. 242, it is said:—"It is here proper to observe that every "species of uncertainty which may prove an occasion of conten-"tion is invalid in a contract of sale."

Having regard to these authorities, it appears to us that the contract of the 17th May 1896 amounted to an invalid sale. The price was not so known or determined as to prevent dispute; the contract was for the sale of a house at a price to be fixed by third parties; the delivery of possession was indefinitely delayed, being dependent upon the ascertainment at some future time of the value of the buildings.

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Mr. *Karamat Husain*, who appeared for Ajaib Ali, did contend that the sale was of the category of operative sales, but such sales are defined as "sales which take effect immediately" Baillie's Moohummudan Law of Sale, p. 6; Baillie's Digest of Moohummudan Law, p. 484 (6), but he was forced to concede that in its inception, at all events, it was an invalid sale.

If then the sale was an invalid sale, there are numerous passages in the Muhammadan Law books which show that such a sale cannot give rise to a claim for pre-emption by or against the purchaser so long as the invalidating circumstances exist. It is sufficient to refer to the following:—"The privilege of "Shaffa cannot take place regarding a house transferred by an "invalid sale"—Hamilton's Hedaya, p. 650. "There must also "be an entire cessation of all right on the part of the seller. "There is therefore no right of pre-emption for an invalid sale" —Baillie's Digest of Moohummudan Law, p. 477.

و منها زوال حق البائع فلا تجب الشفعة في الشراء فاسداً *

عالمگيري جلد رابع الشفعة باب اول صفحه ۳ — طبع نولكشور *

Alamgírí, Vol. IV, p. 3, Lucknow edition. Book on Pre-emption, Chapter I.

"And one of them (the conditions of pre-emption) is the "extinction of the vendor's title, hence the (right of) pre-emption "does not arise in an invalid sale." "The right of pre-emption "arises only when the contract transferring the right of property "from the vendor to the vendee has become complete. A mere "executory contract does not give rise to a right of pre-emption. "* * * * * Nor does the right take effect in respect of a transfer "made under an invalid sale, for the transferor under such a sale "maintains all his rights intact, and so long as he has not "delivered the property to the purchaser can exercise his right "of pre-emption over the transfer of an adjacent property"— Syed Ameer Ali's Muhammadan Law, 2nd edition, p. 591.

The reason for the rule that a right of pre-emption does not arise upon an invalid sale is that the ownership of the vendor in the property sold must be extinguished before the right can arise. One of the conditions of Shaffa is that "there must be a cessation "of the seller's right in the subject of the sale." Baillie's Digest

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of Muhummadan Law, p. 476. So long as the proprietary right has not passed under a contract of sale from the vendor to the vendee, the vendor may himself claim a right of pre-emption against the purchaser of an adjacent tenement. This is clear from the following passage in the Fatwa Alamgiri :—

اگر مشتري نے بطور فاسد خريدي هوے دار کو اپنے قبضہ ميں کرليا حتيٰ کہ اُسکا مالک هوگيا پھر اِس دار کے پہلو ميں دوسرا دار فروخت کيا گيا تو مشتري کو شفع حاصل هوگا پس اگر اوسنے هنوز دوسرے دار کو شفع ميں نہ ليا تھا کہ اوسکے بائع نے اُس دار مبيعہ کو بوجہہ فساد بيع کے واپس کرليا تو مشتري کو دوسرے دار کے لينے کا اختيار نرهيگا اور اگر مشتري دوسرے کو بحق شفع لے چکا هو پھر اوسکے بائع نے اوس سے دار مبيعہ بحکم فساد بيع واپس ليا تو بحق شفع لينا برقرار کہا جائيگا - يہہ محيط ميں هی *

Alamgiri, Vol. IV, p. 5, Lucknow edition :—

"The purchaser of a house sold under an invalid sale took "possession of it, whereby he became its owner. Then if a house "adjacent to that house was sold the purchaser would have the "right of pre-emption.

"If prior to his acquiring the second house by pre-emption "his vendor took back the house sold to him owing to the invali- "dity in the sale, the purchaser will not then have a right to take "the house by right of pre-emption.

"If the vendor takes back the house by reason of its invalidity "after the vendee has acquired the second house by pre-emption, "then the acquisition (of the house) by pre-emption will not be "disturbed. This is in Moheet."

But in the case of an invalid sale the right of pre-emption arises when the contract transferring the property becomes complete by possession being given. According to the Hedaya, "in case of invalid sale, the purchaser becomes proprietor of the "article upon taking possession of it, and is responsible for it, if "it be lost in his hands"—Hedaya, p. 267. The same principle is also laid down in the following passage from the Fatwa Alamgiri :—

واما شرائطالصحة فعامتہ و خاصة فالعامتہ لکل بيع ما هو شرطالانعقاد لان مالا ينعقد لم يصح ولا ينعکس فانالفاسد عندنا منعقد نافذ اذا اتصل بہالقبض *

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عالمگیری جلد ثالث کتاب البیوع باب اول صفحہ ۳ - طبع نولکشور لکھنؤ *

Alamgiri, Vol. III, p. 3, Lucknow edition: Book on sales. Chapter I.

"And the conditions of the invalidity (of the sale) are either "general or special. The general condition in case of each sale "is that which is the condition of the constitution (of the sale) "because what is not constituted is not valid, and the contrary "is not true, because according to us an invalid sale is constituted "and takes effect when possession is joined with it."

So in Baillie's Muhammadan Law of Sale it is said:—"An "unlawful sale is that which takes effect when followed by pos-"session of the thing sold" (p. 7).

Having regard to the authorities quoted above, we are of opinion that the sale of the 17th May 1895 was an invalid sale; that the ownership in the subject of the sale did not pass to Ajaib Ali on the date of the contract, nor until the 6th September 1896, when he, on payment of the price, obtained possession.

On behalf of Ajaib Ali it has been contended by Mr. *Karamat Husain* that sale is completed by declaration and acceptance, that is to say, when the offer of the vendor has been accepted by the vendee; and he has referred us to the Hedaya, p. 241. The passage, however, appears to refer to the constitution of the contract of sale, and has no reference to the conditions necessary to its validity. With regard to the constitution of the contract of sale, there is no material difference between the Muhammadan and other systems of law. The contract, whether the sale be a valid or invalid sale, is complete, in the sense of the agreement being concluded, upon the offer of the seller being accepted by the purchaser.

In the case of a valid sale there is clear authority to show that ownership passes before delivery of possession. "The legal "effect of sale is to establish a right of property in the buyer to "the thing sold and in the seller to the price when the sale is "absolute," *i.e.*, absolute as distinguished from dependent (with an option) or invalid. Baillie's Muhammadan Law of Sale, p. 7. See Hamilton's Hedaya, p. 553, where it is said:—"If the "Shafee bring the seller into court whilst the house is still in his

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"possession, he (the Shafee) may commence his litigation against "him, and the seller may retain the house in his own possession "until he receive the price from the Shafee. The Kazee, however, "is not in this case to hear the evidence until the purchaser also "appear, as for his presence there is a twofold reason; for, first, "the purchaser is proprietor of the ground, and the seller the "possessor; and as the decree of the Kazee must be against both, "both therefore must be present. (It is otherwise where the pur-"chaser has obtained possession: for then there can be no occasion "for the presence of the seller, as he has become like a stranger, "having neither the property nor the possession.)"

In the case of an invalid sale we have seen that the purchaser becomes the proprietor of the thing sold on taking possession of it: but it has been contended that he becomes owner as from the date of the original contract, and in support of this contention we have been referred to a number of texts. All these texts, however, deal with cases of sales with an option. The general rule appears to be that "when an option is reserved to the seller "the right of property in the thing sold does not pass from him, "but such right in the price passes from the purchaser;" and "when the option is reserved to the purchaser the right of pro-"perty in the price does not pass out of him, but the thing sold "passes from the seller."* See Baillie's Muhammadan Law of Sale, pp. 67-68. To take the case of an option reserved to the seller, the sale on principle, so far as he is concerned, is otherwise a valid or out-and-out sale, and therefore the right of property passes from him as in the case of an ordinary valid or out-and-out sale.

It is a well recognized principle that there must be a cessation of the seller's ownership in the thing sold, an ownership in the pre-emptor "*at the time of the purchase* in the mansion on "account of which he (the pre-emptor) claims the right of pre-"emption"—Baillie's Digest, pp. 476-477. That there is no such cessation of the seller's ownership in the thing sold and ownership in the purchaser at the time of a contract of invalid sale seems to be clear from the fact that so long as the vitiating circumstances are not removed it is the seller, and not the purchaser, who is entitled to pre-emption in the case of a subsequent

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sale of an adjoining tenement. The text quoted from the Alamgiri, Vol. IV, p. 5, to which we have already referred, seems to leave no doubt upon the point. That text seems also to show that when on the vitiating circumstances being removed, as by possession, an invalid sale becomes complete, the ownership does not pass from the seller to the purchaser as from the date of the sale.

The result is that we must find, firstly, that Ajaib Ali did not become the owner of the house purchased by him until the 6th September 1896, and therefore he was not entitled to claim pre-emption against Najm-un-nissa when she purchased her houses on the 14th July 1896; secondly, that Najm-un-nissa was entitled, on the sale to Ajaib Ali becoming complete on the 6th September 1896, to claim pre-emption against him. Accordingly we allow the appeal of Najm-un-nissa and dismiss that of Ajaib Ali. Najm-un-nissa will have her costs of both appeals.

Appeal decreed.

1900

May 18.

Before Mr. Justice Banerji and Mr. Justice Aikman.

DAMODAR DAS (PLAINTIFF) *v.* MUHAMMAD HUSAIN (DEFENDANT).*

Act No. IX of 1872 *(Indian Contract Act), sections* 135, 137—*Principal and Surety—Agreement to give time to principal debtor—Gratuitous agreement—Surety not discharged.*

A mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety. In order to have such effect an agreement to give time to the principal debtor must amount to a contract, that is, there must be consideration therefor. *Philpot* v. *Briant* (1), *Tucker* v. *Laing* (2), and *Clarke* v. *Birley* (3), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *D. N. Banerji*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

BANERJI and AIKMAN, JJ.—The question which arises in this appeal is whether the defendant Muhammad Husain, who was surety for the defendant Wali Ahmad, was discharged

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*Second Appeal No. 22 of 1898 from a decree of E. J. Kitts, Esq., District Judge of Bareilly, dated the 29th September 1897, confirming a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 24th February 1897.

(1) (1828) 4 Bing., 717. (2) (1856) 2 K. and J., 745.
(3) (1888) L. R. 41, Ch. D. 422.